

Amarjeet (Migration) [2018] AATA 5720 (25 October 2018)

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2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Amarjeet Amarjeet
CASE NUMBER:	1801155
DIBP REFERENCE(S):	BCC2017/3059474
MEMBER:	Mara Moustafine
DATE:	25 October 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 25 October 2018 at 3:40pm

3. **CATCHWORDS**

MIGRATION – Student (Temporary) (Class TU) visa – bogus documents – false and misleading information – decision under review affirmed

4.

LEGISLATION

Migration Act 1958, ss 5(1), 65

Migration Regulations 1994, Schedule 2, r 1.03, cl 500.217(1), Public Interest Criterion (PIC 4020)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 15 January 2018 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 24 August 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because she found that the applicant did not meet Public Interest Criterion 4020 (PIC 4020).
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217(1) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Evidence before the Department

10. According to the delegate's decision record, a copy of which was submitted to the Tribunal with the review application, the applicant provided, or caused to have provided, a bogus document or false or misleading information in relation to his Student visa application.

11. In particular, on 24 August 2017, the applicant provided evidence to the Department that was considered to be of a 'non-genuine' nature: the death certificates of his grandmother and grandfather, submitted with his visa application.
12. On 10 November 2016 the Department wrote to applicant through his migration agent, requesting him to provide comment on the adverse findings. However, the applicant failed to respond.
13. In her decision of 15 January 2018, the delegate found that the applicant had given bogus documents within the meaning of section 5(1) of the Migration Act and, therefore, provided information which is false or misleading in a material particular. No information was submitted that indicated that the applicant was seeking a waiver of PIC 4020. Accordingly, the delegate was not satisfied that he met Public Interest Criterion (PIC) 4020, subclause 4020(1) and accordingly, did not meet Regulation 500.217.

14. Application for Review

15. The applicant applied to the Tribunal for a review of the delegate's decision. He provided copy of the decision for the purposes of the review and is taken to be on notice of the delegate's findings and reasons.
16. The applicant was represented in relation to the review by his registered migration agent.
17. On 25 October 2018 the migration agent provided to the Tribunal a submission and supporting academic documents. In an explanation of the circumstances around the provision of the documents which were found to be bogus, the submission stated that:
 - a. As the applicant's parents were uneducated and illiterate, he contacted a local person in India through one of his friends to obtain the death certificates of his grandparents in order to provide them with his visa application to show why he could not study after his arrival in Australia.
 - b. He uploaded the documents on the Immigration portal for his visa renewal without checking the authenticity of the documents but never had any intention to provide any bogus document to the Department.
 - c. When he received the letter from the Department seeking his comment on adverse information, he could not imagine that he might have provided/uploaded bogus documents because of an irresponsible person in India as the person had charged him for providing the death certificates. So he received the bogus documents from India and unknowingly provide those documents to the Department.
 - d. He requested more time for the applicant to provide the correct death certificates of his grandparents to the Tribunal.
 - e. He has completed a Diploma of Business and wishes to complete his MBA in Australia before returning to India.
18. The applicant appeared before the Tribunal on 25 October 2018 to give evidence and present arguments.
19. At the hearing, the Tribunal discussed with the applicant the sequence of events outlined in paragraphs 6-9 above. The applicant accepted that the above chronology was a fair representation of what transpired during the Department's processing of his application.

20. The applicant confirmed that the death certificates he submitted with his Student visa application were bogus but that he had been unaware of this at the time he submitted them. He outlined the sequence of events in terms consistent with his agent's submission. He said he had not responded to the Department's invitation to comment on the adverse information because he was unable to obtain new documents within the 28 day timeframe. He clarified that he was not currently studying pending resolution of his Student visa refusal.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

21. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
22. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
23. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
24. The Tribunal explained that PIC 4020 applied if an applicant has given, or caused to be given to the Minister or an officer of the Department a bogus document or information that was false or misleading in the context of a Student visa application; and that this applied whether or not the document was provided by the applicant knowingly or unwittingly. The Tribunal also noted that as he had already admitted that the death certificates of his grandparents which he had provided with his application were bogus, this could not be overcome by provision of new death certificates.
25. Based on all the evidence before it and the considerations and reasoning above the Tribunal finds that there is evidence that the applicant has given, or caused to be given, to the Department a 'bogus document', as defined in s.5(1) (see attached), ie is counterfeit or has been altered by a person who does not have authority to do so.
26. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

27. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

28. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
29. After explaining the waiver provisions to the applicant at the hearing the Tribunal asked him whether he wished to put forward any submissions regarding the waiver provisions. The applicant responded that he wished to finish his studies in Australia and could prove that his grandparents were really dead.
30. Based on the evidence before it the Tribunal is not satisfied that the applicant's circumstances constitute compelling circumstances that affect the interests of Australia, or that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen, to justify the granting of the visa. Accordingly, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived.
31. Therefore the requirements of PIC 4020(1) should not be waived.
32. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.500.217(1).
33. There is nothing in the information before to the Tribunal to indicate that the applicant is eligible to be granted a student visa of another subclass.

DECISION

34. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Mara Moustafine
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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